

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-02-479

JEFFERSON-PILOT LIFE INSURANCE CO.,
Plaintiff
v.
CHRISTOPHER L. KEARNEY,
Defendant

DEPOSITION OF: ROBERT MILLS, taken before
Sharon R. Roy, Notary Public Stenographer, pursuant
to Rule 30 of the Massachusetts Rules of Civil
Procedure, at the law offices of ACCURATE COURT
REPORTING, 1500 Main Street, Springfield,
Massachusetts on May 14, 2004 commencing at 8:38 p.m.

APPEARANCES:

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Sharon R. Roy
Certified Shorthand Reporter
Registered Professional Reporter

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APPEARANCES:

FOR THE PLAINTIFF:

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BY: WILLIAM R. ELLIS, ESQ.

FOR THE DEFENDANT:

GRAYDON HEAD & RITCHIE LLP
1900 Fifth Third Center
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513-621-6464
BY: MICHAEL A. ROBERTS, ESQ.

Also Present:

Adam E. Formus
Joanne Yacavone, Videographer

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THE VIDEOGRAPHER: The caption of
the case is Jefferson-Pilot Life Insurance
Company, plaintiff, versus Christopher L.
Kearney, case number C-1-02-479. Would the
court reporter please swear in the witness.

ROBERT MILLS. Deponent, having
first been duly sworn, deposes and states as
follows:

MR. ROBERTS: This is Mike Roberts,
counsel for the defendant, and we are here on
Friday morning, May 14, 2004 at 8:40. This
deposition was to begin at 8:30 in the
morning. Since 8:30 two procedural issues
have arisen in the case.

First, to describe the scene, we're
in the court reporter's office conference
room in Springfield, Massachusetts. At the
table is the videographer, court reporter,
Mr. Ellis, counsel for the plaintiff, the
witness, and myself. In the corner of the
room is a lawyer named Adam Formus who is
in-house counsel for DMS. Yesterday during

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the course of two depositions Mr. Formus sat away from the table in the corner of the room taking down on his laptop every word that was said in the room. That's not a problem. The problem is he was connected to the Internet and connected to his office during yesterday's proceedings.

I took one long deposition yesterday of Mr. Ditmar, and at the second deposition I asked the witness if he had any communications regarding the conduct of the proceeding. It was my understanding from the testimony that Mr. Formus's Internet connection back to the office and his word-for-word transcription of the day's proceedings were communicated to Mr. Bonsai. For that reason this morning when I arrived I requested that Mr. Formus, if he desired to take down every word that is spoken today in addition to the court reporter doing so, he could do so on his laptop and save that information to his laptop either on a disc or not to a disc, he could save it to the hard drive on the laptop. That was unacceptable

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the depositions. Mr. Ellis handed to me at 8:30 this morning or 8:32 a fax that purports to be from a woman named Christie Zerges, from the law firm of Wood & Lamping, who I understand to be Mr. Ellis's paralegal. The fax was transmitted, according to the fax transmittal line, at 4:18 May 13, 2004, and the fax is specifically directed to the Springfield Marriott, Guest Michael Roberts. I stayed at the Springfield Marriott yesterday. The total number of pages is six. And the note written by Christie Zerges is, "Mike, attached, please find the privilege log which was completed today in the above case."

Apparently, Mr. Ellis intercepted this fax before I could receive it at the Marriott yesterday and I was not provided it prior to the conduct of this deposition. Perhaps that was because he didn't desire me to be able to review it before the deposition.

Nonetheless, the third procedural issue, actually, is that the privilege log

to Mr. Formus. He said, "No, I'm not going to do it. I'm going to be connected to the Internet." So there is reason to suspect that these proceedings are being transmitted back to DMS's office contemporaneous with the proceedings. I have to take still two more depositions this afternoon and I've asked Mr. Formus for his courtesy in not being connected to the Internet, not being connected to his network back at the office and he refuses.

The second procedural issues that arose, is for approximately 15 months the defendant has been seeking the privilege log be provided. The privilege log due in the case from the plaintiff was due approximately 15 months ago and there has been more than a dozen requests for the privilege log. We are now beyond the discovery cut-off. I am here on my last day of depositions of DMS employees. I've taken the depositions I intend to take of the Jefferson-Pilot employees. I've told Mr. Ellis that I need the privilege log before the conclusion of

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itself is woefully insufficient. The rules specifically require that the privilege log contain the dates of the communication, the author of the communication by name, the recipient, and the substance of the communication. The purpose for that is obvious. It's for the Court to be able or the lawyer to be able to determine whether in fact there is an appropriate designation of privilege.

Notwithstanding those very unambiguous obligations, Mr. Ellis's office has prepared a list of the 86 pages, I knew what 86 pages they were, I knew what the Bates numbers were, and all he has done is recited the Bates number of those pages and said "privileged communication." Some said "privileged communication from counsel to client," some said "privileged communication between counsel." Otherwise there is no data provided in the alleged privilege log that complies with the rule or offers the opposing party the opportunity to explore whether or not it's an appropriate exercise or assertion

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1 of privilege. And for that reason I'll be
 2 filing a motion with the Court, but all these
 3 depositions will be convened in progress
 4 since the defendant has still not complied
 5 with its very clear and unambiguous
 6 discovery obligations.

7 Are you ready, Mr. Mills?

8 THE WITNESS: Yes.

9 MR. ELLIS: Excuse me, we'll
 10 respond.

11 MR. FORMUS: As in-house counsel for
 12 Disability Management Services I categorically
 13 deny and reject Mr. Roberts' statement that I
 14 shared any information whatsoever with either
 15 Mr. Bonsall or Mr. Ditmar at any time
 16 yesterday either personally and/or via the
 17 Internet that's connected to the hard drive in
 18 my office. The laptop is for purposes of
 19 saving my notes with regards to yesterday's
 20 depositions directly to my hard drive. I
 21 neither communicated directly or indirectly
 22 with Mr. Bonsall yesterday. Therefore,
 23 Mr. Roberts' allegation was patently false.

24 MR. ELLIS: With regard to the

1 privilege log --

2 MR. ROBERTS: We'll mark the
 3 privilege log as Exhibit 42, for the record.

4 (Exhibit 42, marked)

5 MR. ELLIS: Are you finished?

6 MR. ROBERTS: Yeah, go ahead.

7 MR. ELLIS: With regard to the
 8 privilege log, which was prepared by my office
 9 in my absence at Mr. Roberts' request, I don't
 10 know about 15 months or 12 requests for it in
 11 the past because I have not had an opportunity
 12 to determine the accuracy of those statements.
 13 I've told Mr. Roberts that I received the
 14 privilege log by fax. I received a copy and
 15 there was a copy for him. It was in one
 16 envelope at the hotel. I didn't intercept it
 17 or attempt to intercept it. I opened the
 18 envelope at 10:30 last night. I found both
 19 faxes in it. I didn't call him at 10:30 last
 20 night, I gave it to him this morning. The
 21 privilege log, if inadequate in any way, will
 22 be amended to comply with whatever
 23 requirements there are with regard to the
 24 privilege log as quickly as possible and I

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1 have no objection if he wants to continue
 2 these in progress based upon the privilege
 3 log, although none of the witnesses here are
 4 party to any of the privileged documents.

5 MR. ROBERTS: It's curious how the
 6 Marriott could determine from a fax directed
 7 to Mike Roberts, with a special note to Mike
 8 Roberts on the cover sheet, that I was in any
 9 way affiliated with Bill Ellis. But
 10 regardless, Mr. Mills, are you ready to begin?

11 THE WITNESS: Yes.

12 DIRECT EXAMINATION BY MR. ROBERTS:

13 Q. Could you state your residence address for
 14 the court reporter, please?

15 A. I don't feel comfortable giving my personal
 16 information.

17 Q. Okay. Are you comfortable giving it to
 18 Mr. Ellis and authorizing him to accept a subpoena on
 19 your behalf?

20 A. Yes, I am.

21 Q. Whether or not you're still employed by DMS
 22 before the conclusion of this litigation, you are
 23 willing and you're authorizing Mr. Ellis on this

1 record to accept service of a subpoena on your
 2 behalf?

3 A. Yes, I am.

4 Q. Okay. How old are you?

5 A. I'm 34.

6 Q. Do you have a college degree?

7 A. Again, I don't feel comfortable giving out
 8 personal information.

9 MR. ELLIS: You can tell him whether
 10 or not you have a degree.

11 A. Yes, I do have a college degree.

12 Q. Where did you attend college or where did
 13 you receive your degree from?

14 A. I have a degree from the University of New
 15 Haven in Connecticut, undergraduate, and I also have
 16 a master's degree from Western New England College,
 17 Springfield.

18 Q. When did you receive your bachelor's?

19 A. I received my bachelor's in 1991.

20 Q. And what is your master's in?

21 A. My master's is a general business program.

22 Q. An MBA?

23 A. Correct.

24 Q. When did you receive your MBA?

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1 still be the truth today?

2 A. Well, is your question is it true at that
3 time or is Mr. Midghall my supervisor today?

4 Q. No, my question is not is Mr. Midghall your
5 supervisor today. I don't know how you understood
6 that from the question I asked, but let me be clear.
7 If in 2001 you told someone under oath that in '96
8 and '97 Mr. Midghall was your supervisor, and if it
9 was true then, that's true now, that he was your
10 supervisor back in '96 and '97?

11 A. Well, yes, then, if I said that, he would
12 have been in '96 and '97 my supervisor, that was my
13 testimony.

14 Q. I mean, the past can't change, right?

15 A. Obviously not.

16 Q. And then your supervisors in sequence were
17 Ms. Sweeney, Mr. Ditmar, and Mr. Hughes, right?

18 A. To the best of my recollection, my
19 supervisors would have been in that order that you
20 mentioned.

21 Q. Is Mr. Hughes your supervisor today?

22 A. Yes, Mr. Hughes is.

23 Q. On what block of business did you work in
24 January of 2000?

1 A. I worked -- part of January of 2000 I

2 worked on Travelers Insurance Company, New York Life,
3 Mutual Benefit, Monarch, MassMutual, Connecticut
4 Mutual. I think there was a Woodmen of the World.
5 That's best I can recall.

6 Q. You worked on all those blocks while
7 employed at DMS?

8 A. No, I did not work on all those blocks
9 while employed at DMS.

10 Q. Which of those blocks did you work on not
11 at DMS?

12 A. The blocks that I worked on not at DMS
13 would have been Monarch, Connecticut Mutual,
14 MassMutual. I think that would be it.

15 Q. What block of business do you work on
16 today?

17 A. The block of business I work on today would
18 be Equitable Life Insurance.

19 Q. Was there a period of time you worked on
20 the Jefferson-Pilot block of business?

21 A. Yes, there was a period of time I did work
22 on the Jefferson-Pilot.

23 Q. What period of time was that?

24 A. The period of time would have been January

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1 of 2000 up until probably around the time that these
2 proceedings commenced.

3 Q. When is your judgment of the commencement
4 of these proceedings?

5 A. I believe that was sometime -- my
6 understanding, sometime last year, 2003.

7 Q. Do you recall when in 2003 that you were no
8 longer responsible for the Jefferson-Pilot block of
9 business?

10 A. Best I recall is probably end of 2003.

11 Q. Have you ever received a spot bonus?

12 A. No, I don't recall ever receiving a spot
13 bonus.

14 Q. Mr. Kearney's policy with Jefferson-Pilot
15 was designated as a WJ576A policy, do you recall
16 that?

17 A. I recall the policy.

18 Q. Was his claim under the WJ576A policy the
19 only claim that you administered while handling the
20 Jefferson-Pilot block of business that required you
21 understand the WJ576A policy?

22 MR. ELLIS: Objection.

23 A. As I sit here today, I don't recall whether
24 there were other WJ576As. I would imagine that there

20

1 were a number of other claims that I handled that had
2 the similar policy.

3 Q. Well, there were between three and five
4 hundred claim files transmitted from Jefferson-Pilot
5 to DMS in or about January of 2000. Are you mindful
6 of that?

7 A. What I'm mindful of is that there was a
8 number of cases that were transferred from
9 Jefferson-Pilot to DMS. I wouldn't specifically know
10 the number of those cases.

11 Q. How many people were working on that block
12 of business simultaneous to you in the year 2000?

13 A. Can you repeat the question?

14 Q. How many other people worked like you on
15 the Jefferson-Pilot block of business in 2000?

16 A. To the best of my recollection, there were
17 three other individuals other than myself.

18 Q. Okay. Do you know if the workload on the
19 Jefferson-Pilot block of business was distributed
20 fairly evenly between the four of you?

21 A. I have no idea how they were distributed.

22 Q. Do you know how many claim files that you
23 were administering in 2000 for Jefferson-Pilot?

24 A. Again, as of today, I mean, I don't recall

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1 words, but I know we talked about some of the
 2 difficulties in the case and the differences both,
 3 you know, the company had as well as the differences
 4 of opinions that Mr. Kearney had. I recall Bill --

5 Q. Bill Hughes?

6 A. Bill Hughes starting the meeting by
 7 apologizing that he needed to tell him that we had
 8 recently, just in a matter of minutes, uncovered an
 9 error in the payment of benefits.

10 Q. Bill Hughes discussed with him settlement
 11 options. I remember at one point Attorney Spiegel
 12 asked us to leave and have lunch, that he needed to
 13 speak with Mr. Kearney.

14 Q. I recall returning from lunch waiting in
 15 Attorney Spiegel's waiting room for a while for him
 16 to come out of his office. I recall him coming out,
 17 because he had not talked with Mr. Kearney for a
 18 while. I recall him talking to us about University
 19 of Miami, University of Miami football. I recall him
 20 getting the phone call from Mr. Kearney. He walked
 21 back into his office and talked with him, I presume.
 22 At some point he came back out of the office and told
 23 us that our meeting was essentially over and we could
 24 get back on our plane and go home.

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1 Q. So there wasn't any substantive dialogue
 2 after the lunch hour, you were just waiting and then
 3 finally you were told to go home?

4 A. I remember there was a lot of waiting, we
 5 waited a while.

6 Q. Was there any substantive dialogue after
 7 the lunch hour?

8 A. I mean, what do you mean by substantive
 9 dialogue?

10 Q. You told me you talked about the University
 11 of Miami football team, and we can go into that a
 12 little later, but did you discuss Mr. Kearney's claim
 13 with Mr. Spiegel after the lunch hour?

14 A. I don't recall specifically if we talked
 15 any further details at that point in time. The best
 16 I can recall, it was a general conversation.

17 Q. How long was the morning meeting?

18 A. I don't remember the exact time frames of
 19 the meeting. Going to Florida, we probably would
 20 have had an early morning flight. I believe we met
 21 sometime early morning, 9, 9:30 maybe, then we broke
 22 for lunch at some point.

23 Q. You said recently, in a matter of minutes,
 24 we uncovered an error in the payments. Are you

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1 saying the error in the payments, the alleged error
 2 in the payments to Mr. Kearney was uncovered by
 3 somebody minutes before the meeting with Spiegel?

4 A. Yeah, several minutes before the meeting
 5 with Attorney Spiegel, Bill Hughes and I were in a
 6 Cuban coffee shop, I believe, and I uncovered the
 7 mistake, the Jefferson-Pilot mistake in paying the
 8 increase in benefits.

9 Q. Was it a Jefferson-Pilot mistake or was it
 10 a Jefferson-Pilot mistake and a DMS mistake?

11 A. It was a Jefferson-Pilot mistake that, you
 12 know, I unfortunately continued for quite some time.

13 Q. You got control of the file in January of
 14 2000, and this meeting with Spiegel occurred in
 15 October 2001?

16 A. I got the file around January 2000, and I
 17 believe you're correct, because it was, again, it was
 18 shortly after 9/11.

19 Q. And Mr. Hughes was going on the trip
 20 because he had working knowledge of the file prior to
 21 the Cuban coffee revelation, right?

22 A. He had knowledge of the file, and I believe
 23 the file would also reflect that he had some
 24 communications with Mr. Kearney.

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1 Q. And Mr. Ditmar worked on Mr. Kearney's file
 2 in the late '90's, right?

3 A. I know I handled it from January of 2004.
 4 I don't know the extent of what Mr. Ditmar -- I'm
 5 sure you spoke with him about that yesterday.

6 Q. You're not mindful from your knowledge of
 7 the claim file that he had involvement in the claim
 8 file in the '97 and '98 time frame, at least?

9 A. I'm sure that the file reflects that.

10 Q. Is he good at his job?

11 A. I would imagine that he's good at his job.

12 Q. Does he have difficulty understanding
 13 disability insurance policies, as far as you know?

14 A. I don't necessarily know the man and all
 15 his capacities, but he seems to be a pretty
 16 knowledgeable guy.

17 Q. He was your supervisor for disability
 18 claims for several months or years, right?

19 A. He was my supervisor, I don't know, I can't
 20 recall how long that was.

21 Q. And is Mr. Hughes a knowledgeable fellow?

22 A. I would view Mr. Hughes as a knowledgeable
 23 fellow.

24 Q. With regard to disability claims and

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1 investigators, and persons performing IMEs?

2 A. Can you repeat the question.

3 Q. What's your practice of taking notes of
4 those important phone calls with clients,
5 investigators, and persons performing IMEs?

6 A. I don't have any particular practice. I
7 may scribble down a note if I need to know a date and
8 time of an examination that's scheduled, and as that
9 information is written up and sent along to the
10 insured, I wouldn't need that note. It's not
11 something that I do every time or necessarily on
12 every case.

13 Q. If there are no notes in the claim file of
14 any communication you ever had with Jefferson-Pilot,
15 does that mean you didn't have any communications
16 with Jefferson-Pilot?

17 A. Can you repeat the question?

18 Q. If there are no notes in the claim file of
19 any communication you had with Jefferson-Pilot, does
20 that mean you had no such communication?

21 A. I think this claim file reflects that there
22 had been communication with Jefferson-Pilot, if I had
23 communication with them, and not necessarily
24 everything is going to be written up as a note that I

528:12 your communication last year or was it in 2002?

13 A. I don't recall a specific time, if it was
14 last year. It was just, I think, prior or after we
15 had come across the incorrect amount of benefit. We
16 conversed with their legal department to seek their
17 guidance if this was what we believed it to be. So
18 whenever that happened, I don't remember.

19 Q. Who did you speak to?

20 A. I remember speaking to an in-house
21 counselor by the name of Stephanie Fairbough.

22 Q. And that was shortly after your Cuban
23 coffee revelation?

24 A. I don't know the exact date and time that
25 conversation happened, but I think it would be fair
26 that it was around that time.

27 Q. Okay, was that a phone call?

28 A. I would imagine it was. I don't remember
29 specifically. I don't believe I was down in that
30 area at that time.

31 Q. Have you ever met with her personally?

32 A. I believe I have met with her once.

33 Q. When?

34 A. I don't remember the time.

35 Q. Before or after your Cuban coffee

1 spoke with them.

2 Q. Can you testify under oath that you ever
3 had any communication with anyone at Jefferson-Pilot
4 about Mr. Kearney?

5 A. Can you repeat the question?

6 Q. Can you testify under oath that you ever
7 had any communication with anyone at Jefferson-Pilot
8 about Mr. Kearney?

9 A. I've had communication with Jefferson-Pilot
10 over a number of their cases. I can't say
11 specifically I spoke directly about his case.

12 Q. Did you ever discuss with Jefferson-Pilot
13 the WJ576A policy?

14 A. Yes, I did.

15 Q. When was the last time you had a
16 conversation with someone at Jefferson-Pilot about
17 that policy?

18 A. Best of my recollection, that would have
19 been a communication with their in-house counsel, I
20 believe, last year just prior to these proceedings.

21 Q. These proceedings began in June of 2002,
22 are you mindful of that?

23 A. I don't know when exactly it started.

24 Q. Well, it wasn't last year. So did you have

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1 revelation?

2 A. My recollection is that it would have
3 happened before.

4 Q. Okay. Before the Cuban coffee revelation
5 you had a meeting with Ms. Fairbough. Was that about
6 the WJ567A policy?

7 A. That's such a long time ago, I don't even
8 recall if we even talked about claims. I don't
9 know --

10 Q. What would have been the purpose of your
11 meeting with her the one time you met with her?

12 A. I just remember being down there to visit
13 their offices. I was introduced to a number of
14 people. I can't say that I really had a one-on-one
15 meeting, per se. It might have been a quick
16 conversation. I just don't recall, it's a while ago.

17 Q. So that meeting had nothing to do with Mr.
18 Kearney or the interpretation of the WJ576A policy,
19 is that right?

20 A. To my knowledge, yeah, that would have been
21 before.

22 Q. So --

23 THE WITNESS: Is it okay to take a
24 break at this point?

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10:31:39 1 MR. ELLIS: Sure.
 10:31:40 2 THE VIDEOGRAPHER: Going off record
 10:31:41 3 at 10:30 a.m.
 10:31:42 4 (A recess was taken)
 10:31:43 5 THE VIDEOGRAPHER: Back on record at
 10:31:44 6 10:37 a.m.
 10:31:45 7 Q. (By Mr. Roberts) Mr. Mills, you're still
 10:31:46 8 under oath, you understand that?
 10:31:47 9 A. Yes, I do.
 10:31:48 10 Q. We were talking about a meeting that you
 10:31:49 11 once had with -- down in Greensboro with
 10:31:50 12 Jefferson-Pilot folks, and during the course of that
 10:31:51 13 meeting you were met or introduced to Stephanie
 10:31:52 14 Fairbough, a lawyer at JP, right?
 10:31:53 15 A. Yes, I met her, and I wouldn't necessarily
 10:31:54 16 say it was a meeting. I was introduced to a number
 10:31:55 17 of people, one of which was her. I think we had a
 10:31:56 18 few words, but I don't think we talked anything in
 10:31:57 19 particular about cases.
 10:31:58 20 Q. It had nothing to do with Mr. Kearney's
 10:31:59 21 claim or his policy, right?
 10:31:60 22 A. Not to my knowledge, yes.
 10:31:61 23 Q. And then you went down to Miami and you had
 10:31:62 24 this revelation with Mr. Hughes, right?

10:39:13 1 A. Down in Miami, yes, came to the realization
 10:39:14 2 that the benefits were being incorrectly paid.
 10:39:15 3 Q. Okay. And did you speak to Jefferson-Pilot
 10:39:16 4 that day?
 10:39:17 5 A. I don't recall.
 10:39:18 6 Q. What was the next communication with
 10:39:19 7 Jefferson-Pilot that you can recall regarding Mr.
 10:39:20 8 Kearney or the WJ576A policy and/or its riders?
 10:39:21 9 A. I remember a phone conversation at some
 10:39:22 10 point after our return trip apprising them of our --
 10:39:23 11 Jefferson-Pilot's counsel, of our findings and sought
 10:39:24 12 their guidance on the matter.
 10:40:13 13 Q. And what was their guidance?
 10:40:14 14 A. They agreed that there was an overpayment.
 10:40:15 15 Q. What was their guidance?
 10:40:16 16 A. Their guidance was that our findings were
 10:40:17 17 correct.
 10:40:18 18 Q. Okay. So then what happened in your
 10:40:19 19 communications with Jefferson-Pilot?
 10:41:02 20 A. Can you repeat the question, please?
 10:41:03 21 Q. What then happened with the communications
 10:41:04 22 with Jefferson-Pilot?
 10:41:05 23 A. You know, I don't recall specifically what
 10:41:06 24 happened at that juncture.

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10:41:38 1 Q. There's nothing you can recall from that
 10:41:39 2 moment in time through today of any communication or
 10:41:40 3 dialogue or any interaction you had with
 10:41:41 4 Jefferson-Pilot on that issue?
 10:41:42 5 A. There was, to the best of my memory, a
 10:41:43 6 conversation with Jefferson-Pilot's counsel. I know
 10:41:44 7 that --
 10:41:45 8 Q. The same conversation you've already told
 10:41:46 9 me about?
 10:41:47 10 MR. ELLIS: Excuse me --
 10:41:48 11 Q. (By Mr. Roberts) I want to know if it's
 10:41:49 12 the same conversation you've already talked about or
 10:41:50 13 something additional.
 10:42:02 14 A. My recollection is that it would have been
 10:42:03 15 a subsequent conversation.
 10:42:04 16 Q. Okay. Tell me about that conversation.
 10:42:05 17 A. The best that I can recall is that it was a
 10:42:06 18 discussion of what steps that they wished to take at
 10:42:07 19 that juncture.
 10:42:08 20 Q. Who was involved in the first phone
 10:42:09 21 conversation besides you and Stephanie?
 10:42:10 22 A. My recollection is that Bill Hughes would
 10:42:11 23 have been involved in that call and Bill Dempsey.
 10:42:12 24 Q. Bill Dempsey with Employers Reinsurance

10:43:21 1 Company?
 10:43:22 2 A. Yes.
 10:43:23 3 Q. Okay, who else?
 10:43:24 4 A. That's all I can recall.
 10:43:25 5 Q. Are you mindful of any notes that exist of
 10:43:26 6 this call taken by anyone?
 10:43:27 7 A. Not to my knowledge.
 10:43:28 8 Q. Were you here in Springfield on a
 10:43:29 9 conference call?
 10:43:30 10 A. I believe that was the circumstances.
 10:43:31 11 Q. Were you in Mr. Hughes's office with him?
 10:43:32 12 A. I don't recall specifically where in our
 10:43:33 13 offices that conference call originated for us.
 10:44:14 14 Q. Were you with him?
 10:44:15 15 A. My recollection is that I was.
 10:44:16 16 Q. Were either one of you taking notes during
 10:44:17 17 the call?
 10:44:18 18 A. I don't recall taking any notes. I don't
 10:44:19 19 know if he did.
 10:44:20 20 Q. Did either one of you prepare any documents
 10:44:21 21 in anticipation of the call or in preparation for the
 10:44:22 22 call?
 10:44:23 23 A. Not to my knowledge. We conveyed our
 10:44:24 24 findings verbally over the phone.

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10:44:58 1 Q. Did you tell Ms. Fairbough or Mr. Dempsey
2 why it is you wanted to have the conference call?
3 A. I don't recall if we specifically notified
4 both of those individuals ahead of time of the
5 purpose of the call, but that was obviously discussed
6 during the conversation.
7 Q. Based on your memory of the call, did they
8 have an understanding of what the call would be
9 about, or did you convene this call and they were
10 surprised about the nature of the content?
11 A. Can you repeat the question, please?
12 Q. Based on your memory of the call, was it a
13 surprise to Ms. Fairbough or Mr. Dempsey about the
14 nature or the issue to be discussed during the call?
15 A. I don't recall what their knowledge of the
16 situation was going into the telephone call. I don't
17 know how to characterize their response.
18 Q. How long after your return from Florida was
19 this call?
20 A. I don't recall when that telephone call
took place.
21 Q. Was it within days or weeks or months of
22 the Florida trip?
23 A. That was quite some time ago. I don't know
24

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10:45:53 1 exactly when it would have taken place.
2 Q. Would it make sense and be logical that you
3 would communicate that type of finding to
4 Jefferson-Pilot relatively soon after its discovery?
5 A. Well, it would make sense to obviously
6 communicate that to them in a timely fashion.
7 Q. And is that something that you generally
8 do, communicate important information to clients in a
9 timely fashion?
10 A. Well, we do as best we can to respond
11 timely and promptly.
12 Q. Okay. Are you good at that?
13 A. I think I'm very good at that.
14 Q. Excellent. Is there a Cuban coffee
15 revelation memo somewhere?
16 A. Can you phrase that question another way?
17 Q. Did you understand it?
18 A. No, I didn't.
19 Q. On your return trip from -- this is a
20 relatively significant discovery at the Cuban cafe,
21 wasn't it?
22 A. It was a discovery in a coffee shop that
had some bearing on the case going forward.
23 Q. It had extraordinary bearing on the case
24

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1 going forward, didn't it?
2 A. Yes, it did.
3 Q. Wouldn't it be appropriate within the
4 policies and procedures at DMS to document some
5 extraordinary fact that implicates a claim?
6 A. Well, if I recall correctly, that
information was communicated to Mr. Kearney's counsel
at that time as well as follow-up letters.
7 Q. So the only -- the only memorialization of
the Cuban coffee revelation is that as stated in the
8 October 22, 2001 letter to Mr. Spiegel from
9 Mr. Hughes?
10 A. I would have to look back at the file. I
11 know we sent a letter. I'm assuming that's what
12 you're referring to.
13 Q. Right.
14 A. That was my recollection following that
15 meeting that the letter summarizing the situation in
16 the meeting was sent to his prior counsel, Spiegel.
17 Q. So I understand your testimony correctly,
18 this extraordinary revelation is uncovered drinking
19 Cuban coffee in Miami, Florida nearly ten years after
20 the erroneous payments began, allegedly, and there
21 does not exist any document anywhere that sets forth
22
23
24

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1 your extraordinary revelation other than the letter
2 that was sent to Mr. Spiegel?
3 A. Can you repeat the question, please?
4 Q. You and Mr. Hughes are having Cuban coffee
5 in October 2001. You're reviewing or preparing for a
6 meeting about a claim that's been existing for eight
7 years, right; Mr. Kearney's claim was eight years old
8 at that point?
9 A. 2001; yeah, it's probably about eight
10 years.
11 Q. And the two of you, while sipping your
12 coffee, come upon this extraordinary revelation that
13 Mr. Roberson, who has 38 years of experience, didn't
14 know about, Mr. Shelton, who has 38 years of
15 experience, didn't know about, Mr. Maxwell, who has
16 20 years of experience, didn't know about,
17 Ms. Harden, who has 31 years of experience, didn't
18 know about, Jefferson-Pilot, who authored the policy
19 and administered it for seven years, didn't know
20 about, you, who worked on the policy for a year and
21 eight or nine months, didn't know about, Mr. Ditmar,
22 who you reported to for a year, didn't know about,
23 and Mr. Hughes, who you reported to for another nine
24 or ten months, didn't know about, this extraordinary

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1 revelation occurs and it's your testimony, sir, that
 2 there is not an internal document at DMS or a
 3 document DMS shared with Jefferson-Pilot or a
 4 document DMS shared with Employers Reinsurance which
 5 discusses this great revelation; the only document
 6 that exists is the letter that went to Spiegel after
 7 the meeting? Is that your testimony under oath?

8 A. I don't know if there is any other
 9 document. To my knowledge, there is the letter that
 10 was communicated to the insured. If there's other
 11 letters that were prepared, I know there was counsel
 12 involved and there were letters that were back and
 13 forth on that material through -- I believe it was
 14 prior counsel on this case, and Mr. Ellis. I'm sure
 15 there's stuff out there, I may have seen something,
 16 but I can't a hundred percent say that it said this,
 17 this, and that; it's been a while.

18 Q. You didn't tell Mr. Hughes that you would
 19 do a memo that discusses this Cuban coffee
 20 revelation, and he didn't ask you to prepare a memo
 21 discussing the Cuban coffee revelation, right?

22 A. My recollection is in that Cuban coffee
 23 revelation that you refer to, is that I discovered
 24 the error, you know, the error that JP had made and

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1 A. Yes, I do.
 2 Q. We're talking about whether or not you have
 3 any recollection of any memorandum being prepared
 4 that discusses in details the Cuban coffee
 5 revelation, and as I understand your testimony,
 6 you're not mindful sitting here today that any such
 7 memorandum existed?

8 A. I think what I've said is I remember there
 9 was a letter in the file following the meeting with
 10 Attorney Spiegel that I believe Mr. Hughes wrote to
 11 him outlining the situation. I don't specifically
 12 recall any other type of memorandum, you know, as I
 13 sit here today.

14 Q. Is there any memorandum that you can recall
 15 sitting here today that's been prepared subsequent to
 16 the letter that went to Attorney Spiegel on this
 17 Cuban coffee revelation?

18 A. Can you repeat the question, please?

19 Q. Is there any such memorandum that you're
 20 mindful of that was prepared subsequent to the
 21 responsive letter to Attorney Spiegel in October of
 22 2001?

23 A. To my knowledge, a lot of this stuff has
 24 been handled between the lawyers. I don't

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1 that I perpetuated over the time, and I made him
 2 aware of that.

3 I don't recall any point other than being
 4 embarrassed about it that he was critical of me or
 5 said, "Prepare a document." I just don't recall
 6 that.

7 Q. You don't recall him asking you to prepare
 8 a document detailing and summarizing this
 9 extraordinary revelation, and you didn't offer to do
 10 that; is that your testimony under oath?

11 A. To my recollection, I don't recall him
 12 asking me to do something. If it was prepared or
 13 not, I don't -- as I sit here today, a lot of time
 14 has passed, I don't remember what was prepared on
 15 that at that point in time.

16 MR. ROBERTS: We're going to change
 17 tapes. We'll be right back to this.

18 THE VIDEOGRAPHER: Going off record
 19 at 10:53 a.m.

(Off the record)

20 THE VIDEOGRAPHER: Back on record at

10:57 a.m.

21 Q. (By Mr. Roberts) Mr. Mills, you're still
 22 under oath, you understand that?

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1 specifically recall preparing anything myself.

2 Q. You don't have a memory of authoring
 3 anything in writing after that revelation, that
 4 extraordinary revelation at the Cuban coffee house?

5 A. I'm trying to, as I best remember -- to the
 6 best of my memory, I didn't do anything, but I
 7 just -- I don't remember. It's been a period of time
 8 now.

9 Q. Was there anybody on the DMS in-house legal
 10 team consulted about your Cuban coffee revelation?

11 A. Not to my knowledge.

12 Q. Was Adam Formus, the lawyer that's sitting
 13 in the room here, responsible for the Jefferson-Pilot
 14 block of business in October 2001, as far as you
 15 know, within the legal department at DMS?

16 A. You know, I really don't know what Adam's
 17 full responsibilities are, quite frankly. He's in
 18 the room, you can ask him.

19 Q. Okay, I probably will at some point under
 20 oath. Did you have any discussions with Adam about
 21 your extraordinary Cuban coffee revelation prior to
 22 June of 2002, which would be nine months after you
 23 came upon the revelation?

24 A. I don't recall having conversations with

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1 Adam Formus prior to that time.

2 Q. Do you have a recollection of any
3 conversation you've had with Mr. Formus, or Attorney
4 Formus, about the revelation?

5 A. I don't recall having any conversation with
6 him pertaining to the revelation, as you phrase it.

7 Q. The revelation, as I phrase it, is the way
8 that you came upon interpreting the contract at the
9 Cuban coffee house?

10 MR. ELLIS: Objection.

11 A. That would be my understanding of what you
12 mean by revelation.

13 Q. Okay, good. So sitting here today, you
14 don't have any recollection of any communication
15 you've ever had with Mr. Formus about your
16 interpretation of the policy as you began to
17 interpret it that morning?

18 A. Can you repeat the question, please?

19 Q. Sitting here today, you don't have a
20 recollection of any conversation you've ever had with
21 Attorney Formus about the interpretation of Mr.
22 Kearney's policy which you came upon that day,
23 October 2001, whenever it was?

24 A. I believe your prior questions were about

1 my knowledge of my conversations with Adam at that
2 juncture of June of 2002, I believe you said. I have
3 had conversations with Adam Formus subsequently about
4 the revelation, as we understand it, about the
5 application of the policy.

6 Q. When were those discussions?

7 A. I had at least recently the discussion with
8 him on Wednesday when I met with him.

9 Q. Okay, take me the other way in chronologic
10 order. When's the first one you can discuss, and I
11 guess that one would be the most recent you can
12 discuss.

13 A. I don't recall having any conversations
14 with him about the revelation, really, until I met
15 with him on Wednesday.

16 Q. Okay, so the only conversation you can
17 recall having with Adam about the revelation is the
18 one you had two days ago in Mr. Ellis' presence?

19 A. The only conversation I can recall having
20 with Adam Formus on the revelation was on Wednesday,
21 and the second part of that Mr. Ellis was present at
22 that time.

23 Q. Prior to Wednesday had you had discussions
24 about the revelation with any other in-house counsel?

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1 at DMS?

2 A. Can you repeat the question, please?

3 Q. Prior to Wednesday, had you had discussions
4 about the revelation with any other in-house counsel
5 at DMS?

6 A. Yes.

7 Q. Who?

8 A. I spoke with Andrew Cohen.

9 Q. When was the first time you spoke with
10 Andrew Cohen about the revelation?

11 A. The only time I remember speaking with him
12 was about a week or so, a couple weeks ago.

13 Q. Other than the recent conversation with Mr.
14 Formus, the recent conversation with Mr. Cohen, have
15 you had any discussions with any other in-house
16 counsel at DMS about the revelation?

17 A. Can you repeat the question, please.

18 Q. Other than Mr.'s Formus and Cohen, have you
19 had any other discussions with any other in-house
20 counsel at DMS about the revelation?

21 A. To the best of my knowledge, I don't recall
22 prior conversations.

23 Q. With anyone?

24 A. With any other in-house DMS counsel.

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1 Q. On how many occasions have you spoken to
2 counsel at Jefferson-Pilot about the revelation?

3 A. Can you repeat the question, please?

4 Q. On how many occasions have you spoken to
5 counsel at Jefferson-Pilot about the revelation?

6 A. I don't recall the exact number of times.
7 I think we've already talked a couple times already.
8 I know I've been a part of a phone call during these
9 proceedings at other times with our counsel.

10 Q. Your answer was "I think we've already
11 talked about a couple times"; we haven't. We talked
12 about one communication you had with Fairbough; it
13 had nothing to do with Kearney or the policy when you
14 went to Greensboro. And then we had a discussion
15 earlier about a communication you had, a conference
16 call, between Hughes, yourself, Fairbough, and
17 Dempsey. Other than that conversation with
18 Fairbough, have you had any other discussions about
19 the Kearney policy with in-house counsel at
20 Jefferson-Pilot?

21 A. I've been part of subsequent conversations
22 that weren't initiated by me, conferenced in between
23 Stephanie Fairbough, prior counsel on this case,
24 Geri -- I forgot her last name right now, so there's

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1 been that type of conversation.

2 Q. How many of those were there?

3 A. I don't know how many conversations I've
4 had. I've been involved in a couple of those
5 conversations, not all of them.

6 Q. Were those before the lawsuit was filed or
7 after?

8 A. I don't recall when those conversations
9 necessarily took place in the time frame of all this
10 stuff that's gone on since then.

11 Q. Did you take any notes of those phone
12 calls?

13 A. No, I did not.

14 Q. Did you author any memorandum before or
15 after those phone calls relative to the issue of the
16 phone call?

17 A. Can you repeat the question, please?

18 Q. Did you author any memorandum relative to
19 those phone calls or the issues raised in those phone
20 calls?

21 A. As I sit here now, I don't recall if I
22 authored any memorandum, notes, in regards to those
23 phone calls.

24 Q. Who participated in those phone calls other

than you and Ms. Fairbough and Ms. Geraldine Johnson?

1 A. Johnson was the last name of the other
2 attorney. I don't recall specifically, but I believe
3 the other parties to that conversation would have
4 been Bill Hughes and Bill Dempsey.

5 Q. You spoke in the singular, that
6 conversation. Were there multiple conference calls
7 with some or all of those players or was there just
8 one that you can recall?

9 A. I remember multiple conversations with
10 those individuals. I don't know exactly the exact
11 number of conferences that would have been involved
12 with those individuals.

13 Q. Do you recall from the substance of those
14 conversations whether the persons were speaking in
15 the context of a lawsuit having already been filed,
16 or in anticipation of potential legal action, or
17 both?

18 A. Can you repeat the question, please?

19 Q. Can you recall, based upon the context of
20 those calls, whether people were speaking in terms of
21 a lawsuit having already been filed, or whether there
22 was discussions about the issue and the potential for
23 future litigation?

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1 A. I really don't recall precisely all those
2 conversations and the time frame of those calls
3 happening along the lines of these proceedings. A
4 lot of that stuff was just handled by the attorneys.
5 I had a limited knowledge of what was going on at
6 that point.

7 Q. Did these calls take place over several
8 months or a couple days?

9 A. These calls didn't take place over a couple
10 days. I don't know the period of time, the length of
11 time that these calls took place.

12 Q. Greater than one month's time?

13 A. That seems to be a fair calculation.

14 Q. Are there any notes that exist anywhere
15 including indications on a calendar you may keep of
16 when these calls may have occurred?

17 A. I don't recall specifically writing that
18 down. I could have put it down on my calendar that I
19 have on my desk.

20 MR. ROBERTS: We'll request a copy
21 of that, Counsel.

22 Q. (By Mr. Roberts) Go ahead, I'm sorry.

23 A. But I don't keep a type of running calendar
24 on the computer system or anything like that.

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1 Q. During the course of those discussions was
2 it ever discussed that it would be wise to strip Mr.
3 Kearney of his ability to allege bad faith by
4 continuing to pay him allegedly erroneously?

5 MR. ELLIS: I will object to the
6 question and direct the witness not to answer
7 anything specific about the subject of those
8 conversations. They are both privileged as
9 attorney/client and as work product.

10 MR. ROBERTS: They're not privileged
11 nor are they work product.

12 MR. ELLIS: You will follow my
13 advice and not respond to any question
14 concerning the substance of those
15 conversations.

16 MR. ROBERTS: Boone vs. Van Liner
17 cannot be more unambiguous on this point.

18 Q. (By Mr. Roberts) I understand your counsel
19 is directing you not to answer, so we'll simply have
20 to get the documents that have not been produced and
21 reconvene this deposition and continue it in
22 progress.

23 Are you aware of anybody
24 taking any notes of these calls or anybody authoring

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any documents to memorialize these calls?

A. Again, not to my knowledge. I don't recall any individuals authoring documents. Obviously, in speaking with them, they would probably know better than I.

Q. Did you ever send or receive any e-mails relative to these discussions and the issue of the Cuban coffee revelation?

A. I don't recall sending any e-mails specifically pertaining to the Cuban coffee revelation finding.

Q. What do you mean specifically pertaining to?

A. Addressing that question or issue exclusively.

Q. Do you recall ever sending or receiving an e-mail to or from anyone that discusses the way the policy began to be interpreted after the Cuban coffee meeting with you and Hughes?

A. I recall communicating via e-mail with our -- with the prior counsel on this case, Geri Johnson.

Q. Okay. Anyone else?

A. I just recall e-mails that went to

Ms. Johnson. There might have been other people that were cc'd on that, but I don't recall who those individuals were.

Q. Did she send you e-mails?

A. I believe she did. She did send me e-mails.

Q. Did Ms. Fairbough send you e-mails or copy you on e-mails relating to the issue?

A. I do recall being copied in on e-mails from Ms. Fairbough.

Q. Did Bill Dempsey send to you, or copy you; or did you send to him, or copy to him, e-mails on the issue?

A. Can you repeat the question, please?

Q. Did you send to Mr. Dempsey, receive from Mr. Dempsey, copy from Mr. Dempsey, or did you copy to Mr. Dempsey any e-mails relating to this issue we're discussing?

A. Again, as I sit here today, I don't remember specifically whether or not I was the author of an e-mail where I had communicated directly to him or cc'd him on that e-mail.

Q. Do you recall receiving from him an e-mail or being copied on an e-mail he sent?

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A. I don't remember that specifically. Since we've talked about him being involved in this process, my guess is that he had been cc'd on a lot of those, but I don't know, you'd have to speak with him about it.

Q. Do you delete e-mails you receive?

A. Do I delete e-mails that I receive? Yes, I do.

Q. What's the process you undertake to delete your e-mails?

A. Can we take a break right now?

MR. ELLIS: After you answer the question.

A. Can you repeat the question, please?

Q. What's the process you undertake to delete your e-mails?

A. The process that I undertake to delete my e-mails is, depending on what the e-mail is, I delete it that day. All the ones I delete, you know, at some point in time, I don't have any specific guidelines where if I have an e-mail for a week, a month, a year, that I necessarily delete it. A lot of times my basket is filled up enough that the technological folks will ask you to clean a number of

documents out.

Q. Do you have Microsoft?

MR. ELLIS: He did ask for a break, he answered your question. Go ahead.

THE WITNESS: Thank you.

THE VIDEOGRAPHER: Going off record at 11:21 a.m.

(A recess was taken)

THE VIDEOGRAPHER: Going back on record at 11:30 a.m.

Q. (By Mr. Roberts) Mr. Mills, you're still under oath. You understand?

A. Yes.

Q. Have we exhausted your knowledge, sitting here today, of all the phone conversations, e-mail communications, and written documents that you're aware of sitting here today that exist commenting on, referring to, or relating to the Cuban coffee revelation?

A. I would have to say yes, as a lot of that stuff was handled by the attorneys and really taken out of my hands at that point.

Q. Do you use Microsoft Outlook?

A. Yes, I believe that's what we use.

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1 Q. And when you get an e-mail that you want to
2 save, do you put it in a file folder or do you just
3 leave it in your in box?
4 A. I usually leave it in my in box.
5 Q. Do you have any file folders for your
6 e-mails?
7 A. I think I've probably saved two or three
8 e-mails, that I recall. I don't keep a specific
9 folder to maintain any e-mail; I just don't delete
10 it.
11 Q. If you get an e-mail and you want to delete
12 it immediately or you don't see any reason to keep
13 it, you just push "delete," and is that all you do to
14 get rid of the e-mail, or is there something else you
15 do?
16 A. I would delete the e-mail if I didn't need
17 it. I think there's like a wastebasket that it goes
18 into. I think that's where, after a period of time,
19 there's a number of them, they ask you to delete a
20 number of them. We've gotten a lot of viruses so
21 we've had to delete a number of e-mails to get rid of
22 that.
23 Q. Okay, so, if you go back to your office
24 today, you'll have some e-mails and you might decide

1 to push the "delete" button on them, and you'll do
2 that, right, you'll push "delete" on an e-mail?
3 A. Yeah, I guess that's the process.
4 Q. And then your understanding is it goes to
5 the trash bin?
6 A. I don't know the specific terminology. I'm
7 not a Microsoft technician. It's a wastebasket,
8 deleted items. I don't know where it goes.
9 Q. Do you ever go into the wastebasket of the
10 deleted items or the trash bin and perform an
11 additional function to delete the e-mail?
12 A. Yes, I would do that.
13 Q. How frequently do you do that?
14 A. I think it varies. If I'm given, from our
15 technological folks because it's overloaded and I
16 need to delete some, I'll do that. If we have
17 viruses that come in and we delete those, I delete
18 them again and make sure it's not going to affect our
19 system. Periodically I delete the e-mails that are
20 received and sent because of the waste basket filled
21 up. I don't do it every day, I don't do it every
22 month, but periodically.
23 Q. You don't do it every month. You do it
24 every quarter?

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1 A. To be honest with you, Mr. Roberts, I don't
2 really have any specific time frame. I might do it
3 once a month, semi-annually, I can't remember.
4 Q. You've been advised, though, that the
5 wastebasket will get to some capacity and you have to
6 go in there and delete things to create more
7 capacity?
8 A. I recall receiving communications that
9 there's a large volume of e-mails that are deleted in
10 the wastebasket and we need to ...
11 Q. Are those communications from in-house
12 counsel or from the IT team at DMS?
13 A. My recollection, those would be from our
14 technological unit.
15 Q. Have you ever received any instruction or
16 counsel from the general counsel's office at DMS to
17 delete e-mails on a periodic basis?
18 A. No, I've not received any such
19 communication.
20 Q. Do you use Word?
21 A. Yes, I use Microsoft Word.
22 Q. And Excel?
23 A. I do use Excel periodically.
24 Q. If you create a word document or Excel

1 document on a particular claim, do you always print
2 up the document and put it in the claim file?
3 A. Can you repeat the question, please?
4 Q. If you create a word document or an Excel
5 spread sheet on a particular claim, do you always
6 print up the document and then put it in the claim
7 file?
8 A. I wouldn't necessarily always put whatever
9 was on the Word document or Excel, print it and put
10 it in the file. I imagine a good portion of those
11 letters do go into the file.
12 Q. Whether they go into the file or not, do
13 you maintain them somewhere on the network or on your
14 hard drive?
15 A. I save letters on our hard drive or network
16 drive.
17 Q. All letters?
18 A. No, I don't save all my letters.
19 Q. You don't save all of your claimant-related
20 letters to the network or hard drive?
21 A. No, I don't.
22 Q. Would the same be true about the Excel
23 spread sheets that you might prepare, some of them
24 might get into the claim file, some might not, some

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